

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BOBBY A. GREGG)	
Claimant)	
VS.)	
)	
FORD MOTOR COMPANY)	Docket No. 166,866
Respondent)	
AND)	
)	
CIGNA INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on September 6, 1996. The Appeals Board heard oral argument April 3, 1997.

APPEARANCES

Claimant appeared by his attorney, James M. Roswold of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Terri Z. Austenfeld of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and has adopted the stipulations listed in the Award.

ISSUES

The record indicates claimant suffers from osteoarthritis and underwent surgical replacement of his hip in February 1992. The Administrative Law Judge found that claimant's injuries did not arise out of and in the course of his employment. Claimant appeals from that finding. In the event the Appeals Board concludes that the claim is compensable, the parties ask for a decision on other issues presented to the Administrative Law Judge. This includes: (1) whether claimant gave timely notice and, if not, whether respondent was prejudiced by that failure; (2) whether claimant made a timely application for hearing; (3) what temporary total disability compensation, if any, should be awarded; (4) whether claimant is entitled to past medical expenses; (5) whether claimant is entitled to future medical expenses; (6) whether claimant is entitled to unauthorized medical expenses; and (7) the amount of compensation, if any, due. The parties have stipulated that claimant's injury resulted in a 25 percent permanent partial impairment of the lower extremity. Although the Award lists Liberty Mutual Insurance Company as the insurance carrier, the parties have stipulated that CIGNA was the insurance carrier on the alleged dates of injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed.

Claimant alleges that he was injured the summer of 1987 while working as an employee of respondent Ford Motor Company. The Administrative Law Judge found that claimant did not prove by a preponderance of the credible evidence that his osteoarthritic hip condition and the need for hip replacement were the result of work activities. The evidence indicates claimant experienced symptoms in the summer of 1987. He did not seek medical treatment until January of 1988. Respondent referred him initially to Robert R. Brown, D.O. Dr. Brown referred claimant to Larry D. Cordell, M.D., an orthopedic surgeon. Dr. Cordell took claimant off work from early March 1988 to early August 1988. Dr. Cordell's records reflect that he took claimant off work to reduce the pain in claimant's right hip. While the pain did lessen, it seems clear from the evidence that Dr. Cordell expected surgery, specifically a hip replacement, would be necessary sometime in the future.

When claimant returned to work he was given a job as a janitor. Claimant testified that his duties as a janitor did not, for some time, cause problems with his hip. However, he was later assigned duties sweeping underneath a large carousel. When the new duties produced symptoms, he bid for a job as a fork lift driver. He obtained the job as a fork lift driver and continued to work until January 1992. By that time the symptoms had reached a point he felt he could not continue. He requested a return to Dr. Brown. Following this visit, Dr. Brown advised him that the condition was not caused by his work. Claimant therefore went to his own physician and was referred to an orthopedic specialist, Daniel D. Schaper, M.D. Dr. Schaper performed a hip replacement in February 1992. Claimant was off work for 19 weeks. He then returned to work and worked until December 29, 1995, when

he retired. He testified that he retired when a new contract came out, because he was being overloaded, and, in part, because of his hip condition.

As above indicated, the central question is whether claimant's permanent condition arose out of and in the course of his employment. Both treating orthopedics, Dr. Cordell and Dr. Schaper, testified on the issue. Based upon the more convincing testimony by Dr. Cordell, the Appeals Board agrees that the claimant's permanent condition did not arise out of and in the course of his employment. This finding includes a finding that it was not permanently aggravated, exacerbated, or accelerated by claimant's work.

While the Appeals Board agrees with the conclusion by the Administrative Law Judge, we do not agree there was no medical evidence the condition was aggravated by claimant's work. Dr. Schaper clearly does state that in his opinion the work caused permanent aggravation. The Appeals Board, however, finds the deposition testimony of Dr. Cordell more convincing. He testified that one would logically expect activity to aggravate such a condition. He indicated, however, that studies show that the condition may accelerate and surgery may be necessary earlier for sedentary individuals than active. While Dr. Schaper reluctantly gives some support for this claim, the testimony by Dr. Cordell appears, on balance, more convincing. The Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence the condition was caused by, or was permanently aggravated, exacerbated, or accelerated by, claimant's work. The circumstances are, therefore, similar to those dealt with in Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972). The injury is not compensable.

Although the Administrative Law Judge found work had not permanently aggravated claimant's hip condition, he, nevertheless, awarded temporary total and medical benefits for the period claimant was taken off work by Dr. Cordell in 1987. The Administrative Law Judge explained:

"It should, however, be noted that the benefits previously paid by the carrier were voluntarily provided for complaints assumed to be related to his employment and there should be no need for any refund or indemnity for these."

As with the finding on compensability, the Appeals Board agrees with the conclusion, i.e., awarding the temporary total and medical benefits, but not the rationale. The Appeals Board agrees with awarding benefits for the period March 7, 1988, through August 15, 1988, and related medical, because the evidence, specifically Dr. Cordell's testimony, indicates claimant's work did cause the temporary flare-up which forced claimant to be off work and necessitated the medical treatment by Dr. Cordell. Dr. Cordell took claimant off work to quiet the symptoms caused by the work. This treatment helped and claimant returned to work. The benefits awarded were for a temporary condition which did arise out of and in the course of employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated September 6, 1996, should be, and the same is hereby, affirmed.

WHEREFORE, NO AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bobby Gregg, and against the respondent, Ford Motor Company, and its insurance company, CIGNA, for an accidental injury sustained during the summer of 1987 as alleged except as follows:

Twenty-three weeks of temporary total disability compensation at \$256.00 from March 7, 1988, through August 15, 1988, totaling \$5,888.00, and payment of medical bills incurred for treatment amounting to \$3,079.00.

Costs of transcripts in the record are taxed against respondent and the insurance carrier as follows:

Hostetler & Associates, Inc.	\$552.25
Metropolitan Court Reporters, Inc.	\$780.75

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Roswold, Kansas City, MO
D'Ambra M. Howard, Overland Park, KS
Terri Z. Austenfeld, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director